IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO.4663 OF 1987
WITH
SPECIAL CIVIL APPLICATION NO.4664 OF 1987
SPECIAL CIVIL APPLICATION NO.5426 OF 1985
AND
SPECIAL CIVIL APPLICATION NO.5974 OF 1986

For Approval and Signature:

Hon'ble CHIEF JUSTICE MR DM DHARMADHIKARI

AND

MR.JUSTICE C.K.THAKKAR

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

RAJNIKANT AMBALAL AMIN, ADULT, OCC.AGRICULTURIST

Versus

STATE OF GUJARAT (NOTICE TO BE SERVED UPON THE

Appearance: In SCA No.4663/87
MR KG VAKHARIA with Mr. Tushar Mehta for Petitioners
GOVERNMENT PLEADER LR Pujari for Respondent No. 1
MR KS NANAVATI for Respondent No. 3

In SCA 4664/87:
Mr. K.G. Vakharia with Mr. Tushrar Mehta for

petitioners
Mr. L.R. Pujari, Ld.AGP for Res. No.1
Mr. K.S. Nanavati for Res.No.3
Mr.Arun H Mehta with Mr.D.U. Shah for Res.No.4

In SCA 5974/86:
Mr. K.G. Vakharia with Mr. Tushar Mehta for petitioners
Mr. L.R. Pujari, Ld. AGP for Res.No.1
Mr. K.S. Nanavati for Respondent No.3

In SCA 5426/85:
Mr. S.D. Patel for petitioners
Mr. L.R. Pujari for Res.No.1
Mr. S.N. Shelat, for Res.No.2

CORAM : CHIEF JUSTICE MR DM DHARMADHIKARI and
MR.JUSTICE C.K.THAKKAR
Date of decision: 11/02/2000

COMMON ORAL JUDGEMENT

Per: C.K. Thakkar, J :-

In these petitions, common questions of fact and law have been raised. It is, therefore, convenient to dispose of all the petitions by a Common Judgment.

2. For appreciating the contentions raised in the present group of petitions, the facts in nutshell of the first matter, i.e. Special Civil Application No. 4663 of 1987 may now be stated.

3. The said petition is filed by Chhani Nagar Panchayat (herein after referred to as "Panchayat" for short) for an appropriate writ, direction or order,quashing and setting aside Notifications at Annexure-A & B to the petition dated August 21, 1987, and for permanent injunction restraining the State of Gujarat-Respondent No.1 from exercising power under Section 16 of the Gujarat Industrial Development Act, 1962; and for declaring certain Survey Numbers of Village Chhani as Notified Area under Chapter 26-A of the Gujarat Municipalities Act, 1963. A further prayer was made, restraining the respondent authorities from declaring the

above Survey numbers from deleting as part of Nagar Panchayat under the provisions of the Gujarat Panchayats Act, 1961.

4. The case of the Petitioner Panchayat was that, it was a Panchayat constituted under the provisions of the Gujarat Panchayats Act, 1961. Certain Survey numbers which were within the local limits of Nagar Panchayat were sought to be excluded from the limits of Chhani Nagar Panchayat by issuing a Notification in purported exercise of powers under Section 16 of the Gujarat Industrial Development Act, 1962 read with sub-section (2) of Section 9 of the Gujarat Panchayats Act 1961, as also Chapter-XVI A of the Gujarat Municipalities Act 1963. The notification was to take effect from the date it was published in the Government Gazette .

5. When the petitions were placed for admission, Rule was issued, but interim relief was refused by observing that grant of interim relief would virtually amount to allowing the petition at the stage of admission. The matters have now been called for final hearing.

6. We have heard learned counsel Mr. Tushar Mehta for the petitioner, learned Asst. Govt. Pleader for the State and learned counsel Mr. D.U. Shah for Gujarat Industrial Development Corporation.

7. Learned counsel for the petitioner raised two principal contentions. Firstly, he submitted that before an action under sub section (2) of Section 9 of the Gujarat Panchayats Act excluding a particular area from a Gram or Nagar Panchayat is taken, Gram or Nagar Panchayat must be consulted. Since Chhani Nagar Panchayat was not consulted before issuance of Notification under Section 9 (2) of the Act, the action was without jurisdiction and liable to be set aside. Secondly, it was urged that the exercise of power under Section 16 of the Gujarat Industrial Development Act, 1962 results in civil consequences. Before such an action can be taken, the authorities were duty bound to observe principles of natural justice. Since before taking action under Section 16 of the Act, neither objections were invited nor opportunity of hearing was afforded to the Panchayat, an action is violative of principles of natural justice and void ab initio.

8. The respondents, on the other hand, supported the action taken by the authorities. Regarding action under Section 9, it was submitted that, there was consultation

before exercise of power by the Development Commissioner who had exercised the power under Section 9 (2) of the Act on behalf of the State Government and, therefore, it cannot be said that the action was invalid as there was no consultation with Nagar Panchayat by the authorities. It was stated in this connection that even in the Notification itself there is a recital to the effect that the State Government had consulted District Panchayat, Taluka Panchayat as well as Nagar Panchayat. A resolution was also passed by the Nagar Panhayat. It is, therefore, not correct to state that there was no consultation, and hence the action was bad in law.

9. In the alternative, it was submitted that, even if it is assumed that there was no consultation by the State Government before taking action under sub section (2) of Section 9 of the Act, the action of excluding certain areas from Nagar Panchayat will not ipso facto bad in law or without jurisdiction . It was submitted that the provision relating to consultation with Gram or Nagar Panchayat before exercise of power under Section 9(2) is merely 'directory' and enabling one and not 'mandatory' and peremptive. Hence, even if there was no consultation with the Panchayat before taking an action under Section 9 (2) of the Act, in absence of prejudice to the petitioner, the action cannot be said to be illegal or unlawful.

10. On interpretation of Section 16 of the Gujarat Industrial Development Act, 1962, the learned counsel submitted that, the function to be performed by the authorities and powers to be exercised are in the nature of legislative or quasi-legislative. Before exercise of such power, it is not necessary to comply with the principles of natural justice. Since exclusion of some area from one Gram or Nagar and inclusion of said area in other Gram or Nagar is legislative or quasi-legislative power, the principles of natural do not apply to exercise of such power. On that ground also, the action cannot be said to be bad in law.

11. Regarding Ranoli Gram Panchayat (SCA No. 5426 of 1985) learned counsel Mr. S.N. Shelat appearing for respondent No.2 (Indian Petrochemicals Corporation Ltd) submitted that, the petitioner itself has admitted that there was consultation with Gram Panchayat before the action was taken under Section 9 (2) of the Act and, hence, the said ground is not available to the petitioner Panchayat.

12. The questions for our consideration, therefore,

are; whether the provisions of sub section (2) of Section 9 of the Gujarat Panchayats Act 1961 are directory or mandatory, and whether they were complied with in the instant cases; and whether the action taken under Section 16 of the GIDC Act, 1962 can be said to be legal and valid.

Now, so far as the consultation is concerned, it was, no doubt, contended on behalf of the petitioners that, there was no consultation with Chhani Nagar Panchayat by the State Government before Notification was issued under sub section (2) of Section 9 of the Act. It is, however, necessary to bear in mind that, in the Notification itself which is challenged by the petitioner, there is a recital to the effect that the Notification was issued under sub section (2) of Section 9 of the Act after consultation with Baroda District Panchayat, Baroda Taluka Panchayat and Chhani-Bajwa Gram Panchayat. When such a recital is made in the Notification, there is a presumption in favour of the act which has been done in consonance with the law as reflected in Section 114 of the Evidence Act that the Panchayats concerned were consulted before issuance of the Notification. An affidavit-in-reply is filed by Asst. Chief Executive of GIDC, wherein the assertion made by the petitioner Panchayat was refuted. Though no affidavit is filed on behalf of the State Government, it was stated by learned Addl. Govt. Pleader that Chhani Nagar Panchayat was consulted before issuance of Notification under section (2) of Section 9 of the Act and that Chhani Nagar Panchayat had also passed a Resolution consenting to such action. In view of the fact that the petitioner Panchayat was consulted and that a resolution was passed by the Nagar Panchayat, it cannot be said that there was non compliance with the provision of sub section (2) of Section 9 of the Act.

13. Even otherwise, in our opinion, the contention is not well founded in as much as non-compliance with the provisions of sub section (2) of Section 9 would not, ipso facto, result in action being declared null and void. Section 9 of the Act reads as under:

" 9. (1) After making such inquiries as may be prescribed, the State Government may, by notification in the Official Gazette, declare any local area, comprising a revenue village, or a group of revenue villages, or hamlets forming part of a revenue village, or such other administrative unit or part thereof, -

(a) to be a nagar, if the population of such local area exceeds 10,000 but does not exceed 25,000, and

(b) to be a gram, if the population of such local area does not exceed 10,000:

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(2) After consultation with the taluka panchayat, the district panchayat and the nagar or gram panchayat concerned (if already constituted) the State Government may, by like notification, at any time -

(a) include within, or exclude from, any nagar or gram, any local area or otherwise alter the limits of any nagar or gram; or

(b) declare that any local area shall cease to be nagar or gram; [or] (c) having regard to clauses (a) and (b) of sub-section (1), declare the whole area comprised in a gram or the part thereof to be a nagar or two or more grams or the whole area comprised in a nagar[to be a gram or split up the area comprised in the nagar into a nagar and a gram or into two or more grams;]

and thereupon the local area shall be so included or excluded, or the limits of the nagar or gram so altered [or the local area shall cease to be a nagar or gram or, as the case may be, the area declared to be a nagar or gram shall be a nagar, or gram as the case may be] "

14. A direct question arose before a Division Bench of this Court in KALUBHAI KESRISINGH MAHIDA V. THE STATE OF GUJARAT AND OTHERS, (1965) VI GLR 451. It was contended by the petitioners that , before reconstituting a Panchayat, there was failure on the part of the State Government to consult the Gram Panchayat and thus there was non-compliance with the provisions of Section 9 (2) of the Act, and the action was, therefore, unlawful.

Considering the leading cases on the point, the Division Bench observed as under:-

".. It was contended that the requirement for a prior consultation was a condition precedent to the taking of an action under section 9(2) which was a power conferred on the Government and not a duty. But it must not be forgotten that whatever rights, if any, of having a local-self Government body or of membership to the Panchayat are the creation of the statute which itself brings into existence a Panchayat and its electorate body and provides for its re-arrangement. Such an action of reconstituting or rearranging the areas would not totally and for ever deprive the people of a local self Government body, or the right of the people to elect their representatives to a Panchayat. Since the section provides for the reconstitution of a villa , it also provides that the sense of the Panchayat should be taken before its limits are altered. The section however does not prescribe what consequences would follow if prior consultation is not made before taking an action under the section. Considering the consequences that are likely to follow on the taking of an action under the section and the effect of non-compliance with the part of the section which provides for a prior consultation, and considering the subject matter of the provision and its relation to the general object thereby intended to be secured and upon a review of the matter according to the principles of construction discussed above, it appears that the provision with which we are here concerned is directory and although it does indicate a duty to consult the Panchayat before passing an order under the section, it does not follow that every departure from that duty will taint the whole proceeding with a fatal blemish and render it void and ineffective. We find nothing in section 9 of the Act which would lead us to the conclusion that if the Government omits to consult the Panchayat concerned while taking action under sub-section (2) of section 9, the right of the Panchayat or any person would be adversely affected. There is also nothing in the Act to show that even after consultation the sense indicated by the Panchayat concerned would be binding on the Government. As admitted by the petitioner, the Panchayat was consulted on the question of the formation of a separate Gram Panchayat for the village "Runn". The provision contained in sub-section (2) of section 9 has

thus been substantially complied with. In our view, the direction given in sub-section (2) of section 9 is directory and not mandatory and none of the contentions of Mr. Shastri can therefore prevail. " (Emphasis supplied).

15 Kalubhai Kesrisingh Mahida was cited with approval and followed again by a Division Bench in NARODA NAGAR PANCHAYAT, AHMEDABAD V. STATE OF GUJARAT & ORS, (1997) XVIII GLR 814. In para-22, the Division Bench stated ;

" 22. The argument under this head of challenge was that the provision about consultation in sec. 9 (2) of the Panchayats Act is mandatory and that it was obligatory on the Government not only to consult the concerned panchayat before exercising the powers of exclusion of any area from within the limits of the respective panchayats but also to have abided by the view of the concerned Panchayat, for, "consultation" is equivalent to "consent" or "concurrence". This submission cannot be accepted because it is concluded against the petitioners by the decision of the Division Bench of this Court in Kalubhai v. State, VI G.L.R. 451. It was there held that the provision as to "consultation" contained in sec. 9 (2) of the Act was directory in nature and that although it indicated a duty to consult the Panchayat before passing an order under that section, it did not follow that every departure from that duty would taint the whole proceeding with a fatal blemish and render it void and ineffective . It was further observed that there was nothing in the Panchayats Act to show that even after consultation the sense indicated by the Panchayat concerned would be binding on the Government. We are in complete agreement with the aforesaid observations in Kalubhai's case. As pointed out in the said decision, the provision about consultation has not been included as a safe-guard of a right of any person. Whatever rights, if any, that may be of having a local self-Government body or of membership of the Panchayat are the creation of the Statute which itself brings into existence a Panchayat and its electorate body and provides for its re-arrangement. Such an action of reconstituting or rearranging the areas would not totally and for ever deprive the people of a

local self-Government body, or the right of the people to elect their representatives to a Panchayat. The word "consultation" cannot be equated with "consent" or "concurrence" as contended for by the petitioners. The two sets of expressions have clearly different meanings in common parlance. "

16. In our opinion, therefore, taking any view of the matter, the action in question cannot be said to be illegal or contrary to law. The first contention therefore must be negatived, and it is accordingly negatived.

17. So far as the second contention is concerned, reliance was placed on section 16 of the Gujarat Industrial Development Act, 1962. The said section reads thus ;

" 16. Notification of any industrial area as notified under Gujarat Municipalities Act.

Notwithstanding anything contained in the provisions for the time being in force relating to notified areas in the Gujarat Municipalities Act, 1963, (Guj. XXXIV of 1964) the State Government may, by notification in the Official Gazette.

(a) declare that the provisions relating to notified areas and any other provisions of that Act shall extend to and be brought into force in any industrial area, and thereupon such area shall be deemed to be a notified area under that Act;

(b) appoint the Corporation nor any officer or committee thereof for the purposes of the assessment and recovery of any taxes, when imposed under the provisions so extended and for enforcing such provisions;

(c) provided that the provisions of any other law relating to local authorities which is in force in that area shall cease to apply, and thereupon such provisions shall cease to apply thereto;

(d) make such other provision as is necessary for the purposes of the enforcement of the provisions so extended to that area. "

18. It was submitted that, it has been held by the Hon'ble Supreme Court in several cases that an action of exclusion of part of an area from one local authority and inclusion of the said area into another local authority would result in civil consequences and hence before taking such action it was enjoined on the authority to observe principles of natural justice. In this connection, the attention of the Court was invited to certain decisions.

In BALDEV SIGH AND OTHERS VS. STATE OF HIMACHAL PRADESH AND OTHERS, AIR 1987 SC 1239, some areas within the local limits of one Panchayat were sought to be declared as notified area in exercise of power under Section 256 of the Himachal Pradesh Municipal Act, 1968. Before declaration of such area as notified area, the residents of the locality were not consulted. It was contended that the action in question resulted in civil consequences and prior opportunity of hearing ought to have been afforded to the residents of the locality. The Supreme Court, in light of the facts before it, held that where exercise of power results in civil consequences, unless the statute specifically rules out application of natural justice, they would apply.

Their Lordships stated:-

" We accept the submission on behalf of the appellants that before the notified areas was constituted in terms of Sec. 256 of the Act, the people of the locality should have been afforded an opportunity of being heard and the administrative decision by the State Government should have been taken after considering the views of the residents. Denial of such opportunity is not in consonance with the scheme of the Rule of Law governing our society. We must clarify that the hearing contemplated is not required to be oral and can be by inviting objections and disposing them of in a fair way. "

19. A similar view was taken by the Court in STATE OF U.P. V. PRADHAN SANGH KSHETRA SAMITI, (1995) Supp(2) SCC 305. Our attention was also invited to a recent decision of the Apex Court in SAIJ GRAM PANCHAYAT V. STATE OF GUJARAT, AIR 1999 SC 826. After considering

earlier decisions on the point, the Court observed in para 22;

" 22. It was also contended by the appellants that before any notification could be issued under S. 16 of the Gujarat Industrial Development Act, 1962, a hearing should have been given to the residents. Because notifying an area under S. 16 of the said Act has civil consequences. If the residents had any objections, they should have been considered. Reliance was placed upon a decision of this Court in Baldev Singh V. State of Himachal Pradesh, AIR 1987 SC 1239. In that case under the Himachal Pradesh Municipal Act, a notified area had been declared under S. 256. This Court said that the inclusion of an area governed by a Gram Panchayat within a notified area would certainly involve civil consequences. In such circumstances it is necessary that people who will be affected by the change should be given an opportunity of being heard otherwise they would be visited with serious consequences like loss of office in Gram Panchayats, an imposition of a way of life, higher incidence of tax and the like. Although the section did not, in clear terms, provide a right of hearing, the Court held that denial of such an opportunity was not consonance with the scheme of the Rule of law governing our society. A similar view has been taken in State of U.P. v. Pradhan Sangh Kshettra Samiti, 1995 Supp (2) SCC 305 at page 334 1995 AIR SCW 2303 at pp. 2324 and 2325). In this case delimitation of panchayat areas and Gram sabhas under the U.P. Panchayat Raj Act 1947 was considered by this Court. It said that an opportunity of being heard should have been given to the people of the areas concerned. In that case, action having already been taken without giving an opportunity of hearing, in view of the urgency, post-decisional hearing was considered as sufficient compliance with the principle of audi alteram partem. In the present case, however, there has been a long drawn out exchange of views, consultations as well as consideration of objections over the issuing of a notification under S. 16 of the Gujarat Industrial Development Act, 1962 which was also linked with the exclusion of this area from the panchayat area under S. 9(2) of the Gujarat Panchayats Act, 1961. It was precisely because of these

consultations that GR of 30-8-1993 was also issued to provide revenue to the Gram Panchayats from out of taxes collected from notified areas which were removed from the jurisdiction of Gram Panchayats. Therefore, the appellants cannot complaint of any violation of the principles of natural justice in the present case. "

20. Ld. Govt. Pleader, on the other hand, placed reliance on SUNDERJAS KANYALAL BATHIJA AND OTHERS V. COLLECTOR, THANE, MAHARASHTRA AND OTHERS, AIR 1990 SC 261. The question in that case before the Honourable Supreme Court was regarding nature of function to be performed by the Government in establishment of a Corporation under the Bombay Provincial Municipal Corporation Act, 1949. Considering several leading decisions on the point, Their Lordships held that the function of establishment of a Corporation could neither be said to be executive nor administrative but it was a legislative process. It was, therefore, held that in performing such function, the principles of natural justice have no play. Rules of natural justice would not apply to legislative action, plenary or subordinate.

The following observations of Megarry, J., in Bates v. Lord Hailsham of St. Marylebone, (1972) I WLR 1373 have been quoted with approval:

" In the present case, the committee in question has an entirely different function: It is legislative rather than administrative or executive. The function of the committee is to make or refuse to make a legislative instrument under delegated powers. The order, when made, will lay down the remuneration for solicitors generally and the terms of the order will have to be considered and construed and applied in numberless cases in the future. Let me accept that in the sphere of so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy. Of course, the informal consultation of representative bodies by the legislative

> authority is a common place; but although a few statutes have specifically provided for a general process of publishing draft delegated legislation and considering objections (see, for example, the Factories Act 1961 Schedule 4), I do not now of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given. I accept that the fact that the order will take the form of a statutory instrument does not per se make it immune from attach, whether by injunction or otherwise; but what is important is not its form but its nature, which is plainly legislative. "

The case in Tulsipur Sugar Co.Ltd. V. Notified Area Committee, Tulsipur, AIR 1980 SC 882 has also been considered.

21. No doubt Mr. Mehta, learned counsel for the petitioner submitted that even in Sunderjas, after considering the facts and circumstances of the case, the Supreme Court had made certain observations and reliance was placed in para-28 by the learned counsel, which reads as under:-

> " 28. The principles and precedents thus enjoin us not to support the view taken by the High Court. We may only observe that the Government is expected to act and must act in a way which would make it consistent with the good administration. It is they, and no one else who must pass judgment on this matter. We must, therefore, leave it to the Government."

22. In the instant case, however, in our considered opinion, it may not be necessary for us to express final opinion one way or the other in view of the fact that, as recited in the Notification itself before certain areas were excluded from Chhani Nagar Panchayat, the Nagar Panchayat was consulted and a Resolution to that effect was passed, as stated by learned Asst. Govt. Pleader. Again, the provision was held to be directory by a Division Bench of this Court, which holds the field since more than three decades. Such an action, therefore, can not be said to be without authority of law.

23. For the foregone reasons, none of the contentions

raised on behalf of the petitioners is well founded. The petitions, therefore, deserve to be dismissed, and they are accordingly dismissed. Rule in each of the petitions stands discharged. In the facts and circumstances of the case, there shall be no order as to costs.

/vgn.